STATE OF WISCONSIN
DEPARTMENT OF INDUSTRY, LABOR & HUMAN RELATIONS

Danco Prairie FS Cooperative,

Appellant,

vs. PECFA Claim 953578-9617-50

Secretary, DEPARTMENT OF INDUSTRY,
LABOR AND HUMAN RELATIONS,

Respondent.

FINAL DECISION

PRELIMINARY RECITALS

Pursuant to a petition filed February 11, 1994, under § 101.02(6)(e), Wis. Stats., and §ILHR 47.5), Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, a hearing was held on May 26, 1994, at Madison, Wisconsin.

The issue for determination is whether the department's decision dated January 26, 1994, denying PECFA reimbursement for $1,482.22 in costs for remediation because the remediation alternative used was not the lowest cost alternative was reasonable.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Danco Prairie FS Cooperative
John E. Cullen, General Manager
5371 Farmco Drive
Madison WI 53718

Department of Industry, Labor and Human Relations
201 East Washington Avenue
P, O. Box 7946
MADISON WI 53707-7946

By- William Morrissey, Director
Bureau of Petroleum Inspection & Fire Protection
P O Box 7969
Madison, WI 53707-7969

The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Secretary dated May 20, 1993.

The Hearing Examiner issued a proposed decision in this case dated September 2, 1994. The parties were given 30 days to file objections. No objections having been filed, the matter is now ready for final decision.

F I N A L D E C I S I O N

The Proposed Decision dated September 2, 1994, is hereby adopted as the final decision of the department with the following modifications.

Finding 3 in the proposed decision is modified as follows to correct a typographic error in the proposed decision.

3 . The comparison of costs submitted by John E. Cullen, General Manager of Danco Prairie on September 9, 1993, indicated the actual cost of the chosen thermal treatment alternative was $4394.14, and the estimated cost of landfilling was $3560 to $3778. The amount of contaminated soil which had to be disposed was approximately 70 cubic yards, or 4 to 6 dump trucks of soil.

The Discussion section is modified by the addition of the following as the final paragraph.

Although current rules specify a more detailed process for documenting the comparison of remediation alternatives, the principle that the program will pay only for the lowest cost alternative is embodied in the PECFA Overview dated 10/90 (Exh. 7) which provides that the following costs are ineligible

> Costs associated with inefficient, ineffective or non cost effective cleanup actions.
>
> Costs that DILHR determines to be associated with, but not necessary for cleaning up a discharge.

[Emphasis added.] In this case, Danco Prairie FS Cooperative did not meet its burden of proving that the thermal treatment alternative used instead of the cheaper landfill alternative was "cost effective" or that the additional cost incurred for thermal treatment was a "necessary" cost. For that reason, the department's decision denying the difference between the cost of thermal treatment and the estimated cost of landfilling was reasonable.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not discovered sooner through due diligence. To ask for a new hearing, send a written request to Department of Industry, Labor & Human Relations, Office of Legal Counsel P. 0. Box 7946, Madison WI 53707-7946.

Send a copy of your request for a new hearing to all the other parties named in this decision as “PARTIES IN INTEREST.”

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes.

Petition For Judicial Review

Petitions for Judicial review must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Department of industry, Labor and Human Relations, Office of Legal Counsel 201 E. Washington Avenue, Room 400x, P. O. Box 7946, Madison, WI 53707-7946.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Signed and dated in Madison, Wisconsin this 17th day of October, 1994.

Patrick J. Osborne, Deputy Secretary
Department of Industry, Labor & Human Relations
P O Box 7946
Madison WI 53707-7946
Telephone: 608-266-7552
Facsimile: 608-266-1784

cc: Parties in Interest

STATE OF WISCONSIN

DEPARTMENT OF INDUSTRY, LABOR & HUMAN RELATIONS

Danco Prairie FS Cooperative,

Appellant,

vs. PECFA Claim 453578-9617-50

Secretary, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Respondent.

PROPOSED DECISION

P R E L I M I N A R Y R E C I T A L S

Pursuant to a petition filed February 11, 1994, under § 101.02(6)(e), Wis. Stats., and §ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, a hearing was held on May 26, 1994, at Madison, Wisconsin.

The issue for determination is whether the department's decision dated January 26, 1994, denying PECFA reimbursement for $1,482.22 in costs for remediation because the remediation alternative used was not the lowest cost alternative was reasonable.

There appeared at that time and place the following persons:

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By: William Morrissey, Director
Bureau of Petroleum Inspection & Fire Protection P 0 Box 7969
Madison WI 53707-7969

EXAMINER: Kristiane Randal, Assistant Legal Counsel
Department of Industry, Labor and Human Relations

F I N D I N G S O F F A C T

1. On June 2 1993, Danco Prairie FS Cooperative (Danco Prairie) filed a completed claim with the Department of Industry, Labor & Human Relations (department) requesting reimbursement from the Petroleum Environmental Cleanup Fund Act (PECFA) program relating to a cleanup of petroleum contamination on a site located at 750 15th Street, Prairie du Sac, Wisconsin. The amount of the total claim was $8,451.58.

2. On August 26, 1993, Eric Scott, a PECFA grant reviewer, requested additional information to verify -actual charges for services provided by Danco Prairie, to verify certain invoices, and to "[j]ustify that thermal treatment was the most cost effective remediation method available" including "a detailed cost comparison between the most available landfill and the selected soil disposal method." The information request specified the cost comparison must "[i]nclude laboratory costs, trucking and tipping fees."

3 . The comparison of costs submitted by John E. Cullen, General Manager of Danco Prairie on September 9, 1993, indicated the actual cost of the chosen thermal treatment alternative was $4394.14, and the estimated cost of landfilling was $3560 to $3778. The amount of contaminated soil which had to be disposed was approximately 70 cubic yards, or 4 to 6 dump trucks of soil.

4. On October 11, 1993, Mr. Scott requested "[f]urther justification ... that thermal treatment was the most cost effective remediation method available." In a letter from Robert Pofahl, President, Resource Engineering Associates, Inc., dated October 28, 1993, the department was informed that "[t]hermal treatment based on the comparison is more costly than landfilling, however because petroleum residues (DRO + GRO) exceeded 2000 mg/kg in some of the excavated soils DNR [Department of Natural Resources] guidelines would not allow landfilling of all the soils." The letter indicated further that field testing the soils to separate the soils with contamination above 2,000 mg/kg would add an additional $1,000 to the cost of landfilling. Although Mr. Pofahl alluded to contaminations above 2,000 mg/kg, no laboratory tests or other evidence was provided to the department verifying this level of contamination. Photoionization detector readings on the spoils pile containing the soils excavated during the removal of underground storage tanks indicated one sample having 2,200 mg/kg.

5. The DNR staff person contacted by Resource Engineering to determine the feasibility of landfilling the contaminated soils was Michael Halsted, Waste Management Specialist. At the time Mr. Halsted was contacted, DNR had recently issued guidelines for landfilling contaminated soils. Those guidelines specified certain analytical tests which had to be performed on petroleum contaminated soils prior to landfilling. The guidelines specified that the contamination limit for GRO and DRO was "less than 2000 ppm combined." The guidelines indicated that soils containing less than 2,000 mg/kg could be landfilled, but the guidelines also indicated that "higher concentrations may be approved on a case-by-case basis for small quantities, spill situations, fine grained soils, or thinspreading with the lined landfill area."

6. Mr. Halsted recalls having a conversation about the site, with Mr. Pofahl, however he could not recall being given information about the nature of the sample results showing some concentrations below 2,000 ppm or any discussions of laboratory tests. He recalls that the question put to him was what DNR guidelines applied to soils containing over 2,000 ppm DRO and GRO. Mr. Halsted recalled giving general advice consistent with the guidelines that if the soils contained in excess of 2,000 ppm GRO and DRO, the consultant would have to seek an alternative method of disposal. He did not provide case specific advice under the guideline provision for approval of higher concentrations on a case-by-case basis for small quantities of contaminated soils.

7. On November 18, 1993, Mr. Scott issued the department's decision on the claim. He found $1,655.24 to be ineligible for reimbursement. The deductions included $172.62 in trucking charges, however that decision is not a part of this appeal. DILHR denied $1,482.62 in costs claimed by Danco Prairie for the remediation of the contamination on their site. This amount represents the difference between the estimated cost of landfilling the contaminated soil at Valley Landfill in Ft. Atkinson, Wisconsin and the cost of thermal treatment ($747.01) plus laboratory tests for PCBs which were required for thermal treatment ($101.20 and $347.20) and interest charges on the ineligible cost portion of the claim ($296.81). The department computed the $747.01 difference in costs for landfilling based on an estimate provided by Ed Scari, Valley Landfill, Ft. Atkinson, Wisconsin, on November 4, 1993. After subtracting the statutory deductible, the department issued a check to Danco Prairie for a total reimbursement of $4,167.02.

8. On December 14, 1993, Danco Prairie sent an appeal of the department's decision to Mr. Scott. The appeal was received within the 30 day time limit for filing appeals.

9. On January 26, 1994, Miles Mickelson, the department's Environmental Cleanup Fund Coordinator, notified Danco Prairie that Mr. Scott's decision was being affirmed and that he could request an administrative hearing within 30 days- The request for administrative hearing was filed with the department on February 11, 1994.

D I S C U S S I O N

The decision in this case turns on the issue of burden of proof. Having concluded that a claimant requesting reimbursement under the Petroleum Environmental Cleanup Act (PECFA) program has the burden of proving eligibility, both in the original claim and in an appeal of a department decision denying reimbursement, I have also concluded that the claimant in this case, Danco Prairie, has failed to meet the burden of proving that the remediation alternative selected was eligible for reimbursement as the lowest cost alternative.

The PECFA program provides reimbursement for eligible costs of cleaning up contamination resulting from discharges of petroleum products. It is a categorical program, in the sense that only certain statutorily defined categories of discharges are eligible and only certain specified costs are reimbursed. Structuring reimbursements around defined categories of eligible spills and specific eligible costs permits the program to conserve program resources. It also means that in many cases, there may be unreimbursed costs even when those ineligible costs have to be incurred as a necessary part of an eligible cleanup.

PECFA reimbursement is based on submission of invoices documenting cleanup costs after those costs are incurred and after they have been paid. The Department of Industry, Labor & Human Relations (DILHR,) does not observe any sites being cleaned as part of the PECFA program or independently investigate or inspect cleanup activities. The department's only sources of information about cleanups are submittals from the claimant and information supplied by the Department of Natural Resources (DNR) which the claimant must include with its application. Thus the individual property owner or tank operator, and his or her consultants and contractors, are the only persons with direct, first hand, contemporaneous knowledge of the details of the cleanup.

On the question of who has the burden of proof, the statutes and rules provide little guidance. Generally, the courts have held the moving party has the burden of proof in administrative hearings. In State v. McFarren, 62 Wis. 2d 492 (1974), the Wisconsin Supreme Court considered the burden of proof in a hearing in which the Wisconsin Department of Natural Resources was attempting to enforce an order "requiring Gerald McFarren to remove a quantify of fill which he had allegedly deposited on

the bed of Mud Lake." Id., at 494. The court noted that "McCormick contains the best discussion of the factors involved in allocating burden of proof " Id., at 499. The discussion from McCormick quoted by the court analyzes five factors to be considered in determining who has the burden of proof

The first factor discussed by the court in McFarren was

> (1) 'the natural tendency to place the burdens on the party desiring change,'
>
> 'The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected the bear the risk of failure of proof or persuasion. The rules which assign certain facts material to the enforceability of a claim to the defendant owe their development partly to traditional happen-so and partly to considerations of policy.'
>
> 'the customary common law rule that the moving party has the burden of proof--including not only the burden of going forward but also the burden of persuasion--is generally observed in administrative hearings. Section 7 (c) of the [Federal Administrative Procedure Act], for example provides: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof " State courts have reached the same result in connection with state administrative proceedings.'

Id., at 499-500 [quoting from McComick, Evidence]. In the present case, this factor would indicate the burden should be on the claimant, as the person desiring the "change" from unreimbursed to reimbursed costs.

The second factor discussed in McFarren is inapplicable to this case. The third factor is

> (3) 'convenience'
>
> 'A doctrine often repeated by the courts is that where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue. Examples are the burdens commonly placed upon the defendant to prove payment, discharge in bankruptcy and license.'

Id., at 500 [quoting from McCormick, Evidence]. In the present case, since the property owner or its agents had total control over the cleanup activities and total access to all information about the cleanup, this factor points to placing the burden on the claimant.

The fourth factor discussed in McFarren is the pleading of an exception or negative. In such cases, the party asserting that his or her circumstances fall within the exception or negative "has the burden to prove it unless the facts are peculiarly within the other party's knowledge or are much more difficult for the former to prove than the latter." Id., at 502503. In this case, Danco Prairie asserts that landfilling was not an available option and that thermal treatment was therefore the least costly available alternative. The rules regarding the pleading and proof of a negative would appear to place the burden on Danco Prairie to prove that landfilling was not available as an alternative, even though it was discussed by the consultants his comparison of alternatives and costed out by the consultant as less expensive than thermal treatment. Furthermore, the entire PECFA program is designed as an exception program, Essentially, no one is entitled to reimbursement for cleanups unless they fall within certain exceptions, or categories,

which are reimbursable. Again, the program structure supports the placing of the burden of proof on the claimant.

The final factor is

> (5) 'the judicial estimate of the probabilities.'
>
> 'Perhaps a more frequently significant consideration in the fixing of the burdens of proof is the judicial estimate of the probabilities of the situation. The risk of failure of proof may be placed upon the party who contends that the more unusual event has occurred.'

Id., at 503 [quoting from McCormick, Evidence]. In this case, Danco Prairie is asserting that the alternative proposed by their consultant was prohibited by DNR. Accordingly, this factor again points to placing the burden of proof on the claimant.

There may be issues which will arise in future hearings, such as those involving the reasonableness of costs or fraudulent claim, where DILHR may have the burden of proof because of superior access to information such as cost comparisons and field audits or because of the application of the other factors discussed in McFarren. In general however, it would appear that claimants will normally have the burden of proving their eligibility for PECFA reimbursement, both in the claim itself and also in the administrative hearing to appeal a decision by DILHR denying reimbursement of particular costs.

Danco Prairie argued that the landfill alternative was not available to them because the DNR had prohibited them from landfilling soils containing some soil samples with more than 2,000 parts per million of gasoline related organics (GRO) and diesel related organics (DP,O). I find the conversation with Mr. Halsted does not establish that the alternative was unavailable. Mr. Halsted's testimony was that he was told the consultant had encountered soils with contaminations in excess of 2,000 ppm and that he was asked only what the DNR guidelines were for handling such soils. On this testimony, I have to conclude that the DNR representative was not given enough site specific information to make a decision either approving or prohibiting the landfilling of the soils on the site. There were a variety of facts he should have been given. For example, he should have been informed of the actual readings obtained for all samples, including those below 2,000 ppm; he should have been informed what amount of soil was involved; he should have been informed whether the contamination levels were analyzed in a laboratory or whether they were measured with field instruments; he should have been told that the spoils pile had been moved between the first set of samples for GRO and the second set of samples for DRO- and he should have been told the amount of time the spoils pile had been stored on site. In other words in order to make a "case-by-case" determination of the suitability of landfilling, W. Halsted should have been given case specific information sufficient to make such a decision. The evidence in this case does not convince me that Mr. Halsted's summary of the DNR guidelines in response to a specific question constituted a prohibition of the landfilling alternative. While Mr. Halsted might, in fact, have reached such a decision to prohibit landfilling, he was not given a chance to do so. In the absence of testimony from Mr. Halsted that he directed Danco Prairie that they must separate the soils in order to landfill the spoils pile, I must also reject the estimate from Mr. Pofahl that separation would add $1,000 to the cost of the landfill alternative.

On this record, I have to conclude that the department acted reasonably in concluding, on the basis of the information given to it, that Danco Prairie had not proved their claim for reimbursement for a higher cost alternative. Even after the hearing, where Danco Prairie produced evidence not provided to the department for consideration of the claim, I do not believe the evidence supports Danco Prairie's argument that they used the lowest price alternative available because landfilling was prohibited by

DNR. In the department's decision it deducted only the difference in costs between the landfill alternative and the higher priced thermal treatment alternative. On the basis of this record, I affirm that decision.

C O N C L U S I O N S O F L A W

1. The claimant appealing a denial of costs generally has the burden of proof in the administrative hearing,

2. Danco Prairie did not meet their burden of province that the landfilling alternative was not the lowest cost alternative available.

3 . The department's decision denying the difference in the cost of landfilling the contaminate soils and the cost of thermal treatment, the cost of laboratory tests performed solely to comply with requirements for thermal treatment, and the interest on these costs was reasonable.

O R D E R

That the department's decision is affirmed, and the appeal in this matter is hereby dismissed.

NOTICE TO PARTIES
This is a proposed decision issued pursuant to §227.46(2), Stats. Each party adversely affected by the decision may file written objections to the proposed decision and/or written arguments within 30 days from the date of this decision. Objections or arguments received more than 30 days after the date of this decision will not be included in the record. At the end of 3 0 days, the entire record, including the appeal and other correspondence, exhibits, hearing examiner's notes, tape recording of the hearing, and objections or arguments, if any, will be forwarded to the Deputy Secretary for a final written decision. If the final decision varies in any respect from the decision of the hearing examiner, the Deputy Secretary will include in the decision an explanation of the basis for each variance.

Objections and written arguments may be filed by mailing them to the hearing examiner at the address below.

Signed and dated in Madison, Wisconsin this 2nd day of September, 1994.

Kristiane Randal, Hearing Examiner
Department of Industry, Labor & Human Relations
P O Box 7946
Madison WI 53707-7946
Telephone: 608-267-4433
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